

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Laura Higgins v. Mary F. Thurber (A-12-10)

(NOTE: This Court wrote no full opinion in this case. Rather, the Court's affirmance of the judgment of the Appellate Division is based substantially on the reasons expressed in the opinion below.)

Argued February 8, 2011 -- Decided March 16, 2011

PER CURIAM

The issue in this appeal is whether plaintiffs' legal malpractice action against defendants, the attorneys for the estate of their late father, is precluded by disposition of earlier lawsuits or otherwise barred by the entire controversy doctrine.

In a prior probate proceeding, the executor filed a complaint in the Chancery Division for approval of his formal accounting of an Estate Trust formed by the plaintiffs' deceased father. In exceptions to the accounting filed by plaintiffs, facts were alleged sufficient to constitute a potential legal malpractice claim against defendants, who had intervened in the accounting action on the cusp of a firm trial date. Following the conclusion of the probate proceeding, plaintiffs filed this legal malpractice action against defendants in the Law Division. The judge entered summary judgment in defendants' favor, holding that the legal malpractice claim was barred by the entire controversy doctrine. The Appellate Division reversed and remanded, concluding that plaintiffs' legal malpractice action is not barred. Higgins v. Thurber, 413 N.J. Super. 1, 5 (App. Div. 2010).

The Court granted defendants' petition for certification. 203 N.J. 438 (2010).

HELD: The judgment of the Appellate Division is affirmed substantially for the reasons expressed in Judge Fisher's opinion below. Although a potential claim sounding in legal malpractice may have been raised in the probate proceeding, it cannot be said that plaintiffs had a "full and fair opportunity to litigate those claims or that it would otherwise be equitable to bar this subsequent suit" under the entire controversy doctrine.

1. The Court adds the following. An action to settle an account on an estate trust is a formalistic proceeding, unique to probate, which involves a line-by-line review on the exceptions to the accounting. In the context of this and similar proceedings in probate, the entire controversy doctrine is out of place. As Judge Pressler observed in Perry v. Tuzzio, 288 N.J. Super. 223 (App. Div. 1996), an action for an accounting provides a means for addressing "the conduct of the executor, not the conduct of others." Here, the claims actually pled and prepared for the probate proceeding did not encompass a legal malpractice claim. No affidavit of merit was submitted in support of such a claim. The expert reports that were submitted in the accounting action were framed to address the executor's actions, not to support a malpractice claim against the attorneys. (pp. 2-4)

The judgment of the Appellate Division is **AFFIRMED**.

JUSTICES LONG, LaVECCHIA, RIVERA-SOTO and HOENS and JUDGE STERN (temporarily assigned) join in this PER CURIAM opinion. CHIEF JUSTICE RABNER and JUSTICE ALBIN did not participate.

SUPREME COURT OF NEW JERSEY
A-12 September Term 2010

LAURA HIGGINS and ROBYN
CALCATERRA,

Plaintiffs-Respondents,

v.

MARY F. THURBER and THURBER
CAPPELL, LLC,

Defendants-Appellants.

Argued February 8, 2011 - Decided March 16, 2011

On certification to the Superior Court,
Appellate Division, whose opinion is
reported at 413 N.J. Super. 1 (2010).

Robert B. Hille argued the cause for
appellants (Kalison, McBride, Jackson &
Robertson, attorneys; Mr. Hille and John W.
Kaveney, on the briefs).

Gerald J. Monahan argued the cause for
respondents.

PER CURIAM

The Appellate Division concluded that this legal
malpractice action was not "precluded by the disposition of
earlier lawsuits or otherwise barred." Higgins v. Thurber, 413
N.J. Super. 1, 5 (App. Div.), certif. granted, 203 N.J. 438
(2010). In reversing the grant of summary judgment to
defendants, the panel specifically noted that although a

potential claim sounding in legal malpractice may have been raised in a previous Bergen County probate proceeding in which defendant Mary Thurber intervened on the cusp of a firm trial date, the panel was unable to conclude that plaintiffs had "a full and fair opportunity to litigate those claims or that it would otherwise be equitable to bar this subsequent suit [under the entire controversy doctrine]." Ibid. We now affirm, substantially for the reasons expressed in the cogent opinion written by Judge Fisher. We add only the following in respect of the parties' dealings in the Bergen County probate proceeding.

The probate proceeding here involved an action for settlement of an account, seeking an accounting on an Estate Trust formed by the plaintiffs' deceased father. See R. 4:87-1 to -9 (establishing procedures for actions for the settlement of accounts). In exceptions to the accounting filed by plaintiff, Robyn Calcaterra, see R. 4:87-8, facts were alleged sufficient to constitute a potential legal malpractice claim against defendant Mary Thurber.

An action to settle an account on an estate trust is a formalistic proceeding, unique to probate. See R. 4:87-1(a). Its stylized format involves a line-by-line review on the exceptions to an accounting. In the context of this and like proceedings in probate, the entire controversy doctrine is out

of place. See Perry v. Tuzzio, 288 N.J. Super. 223, 229 (App. Div. 1996). The Appellate Division in the present case rightly detected that it would be anomalous to assume that Thurber's intervention in the specialized probate accounting proceeding that focused on the executor somehow converted the proceeding into an action binding as to any and all other potential actions in respect of other parties. As Judge Pressler observed fifteen years ago in Perry, supra, an action for an accounting on an estate provides a means for addressing "the conduct of the executor, not the conduct of others." Ibid. While it certainly may be permissible for a chancery court to expand a probate proceeding to encompass a claim of legal malpractice, that was not done here.

Here, legal malpractice was not pled by any party to the Bergen County probate action. No affidavit of merit was submitted in support of a claim of legal malpractice. And, our review of the expert reports that were submitted in that accounting action bear out what plaintiffs' counsel asserted at oral argument before this Court: the reports were not geared to support a malpractice claim against the executor's attorney but rather were framed to address the actions of the executor that were being faulted.

In conclusion, we agree with the Appellate Division panel that the belated intervention by Thurber raised equitable

reasons for not applying the entire controversy doctrine in this matter. Moreover, like the Appellate Division, we view the entire controversy doctrine as generally having no place in probate proceedings, for the reasons expressed by Judge Pressler in Perry. Furthermore, we are persuaded to affirm the panel's judgment also for the substantial reason that the claims actually pled and prepared for the probate action by plaintiffs did not encompass a legal malpractice claim against the belatedly intervening Thurber.

The judgment of the Appellate Division is affirmed.

JUSTICES LONG, LaVECCHIA, RIVERA-SOTO and HOENS and JUDGE STERN (temporarily assigned) join in this opinion. CHIEF JUSTICE RABNER and JUSTICE ALBIN did not participate.

SUPREME COURT OF NEW JERSEY

NO. A-12

SEPTEMBER TERM 2010

ON CERTIFICATION TO Appellate Division, Superior Court

LAURA HIGGINS and ROBYN
CALCATERRA,

Plaintiffs-Respondents,

v.

MARY F. THURBER and THURBER
CAPPELL, LLC,

Defendants-Appellants.

DECIDED March 16, 2011
Justice Long PRESIDING

OPINION BY Per Curiam

CONCURRING/DISSENTING OPINIONS BY _____

DISSENTING OPINION BY _____

CHECKLIST	AFFIRM	
CHIEF JUSTICE RABNER	-----	-----
JUSTICE LONG	X	
JUSTICE LaVECCHIA	X	
JUSTICE ALBIN	-----	-----
JUSTICE RIVERA-SOTO	X	
JUSTICE HOENS	X	
JUDGE STERN	X	
TOTALS	5	